

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.06.2019

CORAM

THE HONOURABLE DR. JUSTICE VINEET KOTHARI
and
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.No.2291 of 2018

The Commissioner of Central Excise,
Now known as The Commissioner of GST & Central Excise,
No.1, Williams Road, Cantonment,
Trichirapalli 620 001,
Tamil Nadu.Appellant

vs

M/s.Madras Cements Ltd.,
Govindhapuram,
Senthurai Road,
Ariyalur 621 713,
Tamilnadu.Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 35G of
Central Excise Act, 1994 against the impugned Final Order
No.40358/2018 dated 07.02.2018 on the file of CESTAT.

For Appellant : Mr.A.P.Srinivas

For Respondent : Mr.P.J.Rishikesh

JUDGMENT

[Judgment of the Court was delivered by DR.VINEET KOTHARI, J.]

The Revenue, has filed the present appeal against the Respondent/Assessee, M/s.Madras Cement Limited aggrieved by the order dated 07.02.2018, by which, the learned CESTAT, Chennai allowed the appeal of the assessee and held that in view of the various judgments referred to in paragraph 5 of the order, the Assessee was entitled to avail cenvat credit on MS items/iron and steel used for fabrication of goods or support structures. For the purpose of computation of such cenvat credit, the matter was remanded back by the learned Appellate Tribunal to the Adjudicating Authority. Taking into account the aforesaid decisions, while doing so, the learned Tribunal, however held

that since only the issue of interpretation was involved, the imposition of penalty in such cases was unwarranted and therefore, the penalties were set aside.

2. Paragraph 5 and 6 of the order of the learned Tribunal is quoted for ready reference:

"5.The period involved in the above appeal is from December 2007 to October 2008 and November 2008 to October 2009. The definition of 'input' has undergone an amendment with effect from 7.7.2009. The Hon'ble High Court of Gujarat in the case of Mundra Ports & Special Economic Zone Ltd. vs. Commissioner of Central Excise-2015(39) STR 726 (Guj) had analyzed the amendment brought forth in the said definition and also the applicability of the decision laid down in the case of Vandana Global Ltd. Further, in various decision cited by ld. consultant, the jurisdictional High Court and the Tribunal held that credit availed on MS items/iron and steel used for fabrication of capital goods or support structures is eligible for credit. However, the fact requires verification based on the evidence produced by the appellant. For this limited purpose, we remand the matter to the adjudicating authority who shall analyse the issue afresh after considering the decisions on the said issue. We also find that the issue was an interpretational one and the penalties are unwarranted following the decisions of the Tribunal in the final order cited supra. Hence we set aside the penalties.

6.In the result, the matter is remanded to the adjudicating authority for fresh decision on the basis of various decisions as discussed above."

3. The substantial questions of law, on which the appeal was admitted are hereunder, from the order dated 08.10.2018:

"i) Whether the Tribunal is legal and correct in allowing relief from imposition of penalty to M/s.Madras Cements Limited, Ariyalur in the case when extended period of limitation is invoked under Section 11AC of the Central Excise Act 1944? and

ii) Whether the Tribunal is correct in setting aside the penalty while leaving the question of liability to duty for reconsideration in terms of the provisions of the Central Excise Act, 1944 read with the CENVAT Credit Rules, 2004?"

4.Learned counsel for the Revenue, Mr.A.P.Srinivas, has urged before us that the learned Tribunal, while remanding the case back to the Adjudicating Authority for computation of the

cenvat credit, could not have set aside the penalty altogether and it should have been left free for the Adjudicating Authority to decide the question again and if the ineligible cenvat credit was found to have been availed by the assessee, the discretion to impose penalty should have been left free for the Adjudicating Authority and to this extent, therefore, the order of the learned Tribunal has to be set aside.

5. per contra, learned counsel for the Assessee urged that Section 35C of the Central Excise Act, 1944, empowers the Appellate Tribunal to pass such orders thereon "as it thinks fit" either confirming or modifying or annulling the decision or order appealed against or the Tribunal may remand the case back to the authority, who passed such decision or order with such directions as it may think fit. He submitted that since the power of the learned Tribunal are wide and the Tribunal, being the highest fact finding Appellate body under the Act, it could definitely not only hold that the assessee was entitled for such cenvat credit as indicated in paragraph 5, relying upon various judgments of Gujarat High Court and jurisdictional High Court but the observation about the case warranting no imposition of penalty, was very well within the powers of the learned Tribunal under Section 35C of the Act and the same does not require any interference by this Court in the present appeal filed by the Revenue.

6. Having heard the learned counsel for the parties, we are of the opinion that there is no merit in the present appeal filed by the Revenue. From the aforesaid quoted paragraph 5 of the order of the learned Tribunal on the basis of the various cases referred by the Tribunal, the Tribunal has allowed the entitlement of the assessee to avail the cenvat credit on MS items/iron and steel used for fabrication of goods or support structures. The remand of the Tribunal to the Adjudicating Authority was only for the purpose of computation of figures of such cenvat credit. The Revenue does not dispute before us the entitlement of assessee to avail such cenvat credit. In these circumstances, the finding of the learned Tribunal that the case would not call for any imposition of penalty, which was found to be unwarranted on account of interpretational issues involved it cannot be beyond the scope of power of the learned Tribunal under Section 35C of the Act.

7. The words "as it thinks fit" are wide enough to confer such power upon the Tribunal to exercise its discretion and give its verdict on the imposition of penalty, while remanding the case only for the purpose of computation of cenvat credit, for which Assessee was found entitled.

8. So long as the question of entitlement of Assessee to avail such cenvat credit is not validly disputed or questioned by the Revenue, which in the present case has not so been done, the Revenue cannot insist upon a open remand for leaving the question of penalty of imposition also free to be reconsidered by the Adjudicating Authority. We do not find any illegality committed by the learned Tribunal in this regard and therefore, we find the present appeal by Revenue being without any merit.

9. The judgment relied upon by the Revenue is in the case of Union of India vs Rajasthan Spinning & Weaving Mills, 2009 (238) E.L.T 3 (SC), paragraph 18, which is quoted below also, is of no help to the learned counsel for the Revenue. The said judgment talks of the penalty provision under Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC of the Act. Paragraph 18 of the said judgment reads as under:

"18. One cannot fail to notice that both the proviso to Sub-section 1 of Section 11A and Section 11AC use the same expressions: "...by reasons of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty...." In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A (1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC."

10. We do not find any such occasion to have arisen in the present case. As noted above, the Revenue has not disputed the entitlement of the assessee to avail cenvat credit in the present case, therefore, the question of any deception on the part of the Assessee does not simply arise. Therefore, the aforesaid contention of the learned counsel for the Revenue and reliance placed on the judgment does not anyway helps the Revenue. With these observations, we dismiss the present appeal filed by the Revenue.

11. In view of the aforesaid, both the questions are answered in favour of the Assessee and against the Revenue. Accordingly, the civil miscellaneous appeal filed by the Revenue is dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

The Commissioner of Central Excise,
Now known as The Commissioner of GST & Central Excise,
No.1, Williams Road, Cantonment,
Trichirapalli 620 001,
Tamil Nadu.

+1cc to Mr.P.J.Rishikesh, Advocate Sr.51270
+1cc to Mr.A.P.Srinivas, Advocate Sr.51622

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